

IN THE MATTER OF THE ARBITRATION BETWEEN

United Steel Workers, Local 11-63,

Union,

and

Sappi – Cloquet LLC

Employer.

OPINION AND AWARD

Grievance of USW, Local 11-63
(Termination of RJ)

FMCS Case No. 08-52818

ARBITRATOR:

Janice K. Frankman, Attorney at Law

DATE OF AWARD:

July 25, 2008

HEARING SITE:

Conference Room
Fond du Lac Tribal &
Community College
2101 14th Street
Cloquet MN 55720

HEARING DATE:

April 25, 2008

RECORD CLOSED:

May 30, 2008

REPRESENTING THE UNION:

Gerard Parzino, Staff Representative
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REPRESENTING THE EMPLOYER:

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JURISDICTION

The hearing in this matter was held on April 25, 2008. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of FMCS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on May 30, 2008, when the record closed and the matter was taken under advisement.

ISSUE

The parties agreed to the following statement of the issue:

Whether the Grievant, RJ, was terminated for just cause and if not, what is the appropriate remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

RJ was a 16 year employee of Sappi-Cloquet ("Company"), successor to Potlatch Paper Company when he was terminated from his position on November 12, 2007, following an incident ("incident") on October 31, 2007, involving a co-worker. He had been placed in the Company's Consultation Step of its formal disciplinary process on August 13, 2007. He refused the Company's offer to place him in the Decision Step following investigation of the incident. It had been determined that his behavior had changed significantly and that he had created and continued to escalate a hostile work environment.

Contract Provisions

The parties' Collective Bargaining Agreement ("CBA" "the Agreement") Articles II, XVI and XVII and Attachment #3 are the focus of this matter. They address management rights, performance improvement, conflict resolution procedures and Company policy relative to an alcohol and drug-free workplace.

Article II addresses management rights. It expressly provides the right to terminate employees for just cause. The Consultation Procedure for Performance Improvement at Article XVII sets out problem solving and progressive action steps to address deficiencies in meeting behavioral or performance standards. Article XVI provides for orderly resolution of grievances including binding arbitration. The Alcohol and Drug-Free Policy included in the Human Resource Policy at Attachment 3 is intended to follow Minnesota Statutory law, providing definition of significant words, and sections that provide Regulations, Disciplinary Action, Circumstances Under Which Testing Will Be Required, Testing Procedures and consequences for violating regulations or refusing to undergo testing.

The parties' CBA is unique with regard to its provision for resolution of behavioral and performance issues which arise and may result in discipline including termination as in this case. Articles XVII expresses the Company's philosophy of individual responsibility and collaborative problem solving. It sets out what may become formal disciplinary steps including consultation and decision steps. It provides opportunities for an employee to avoid traditional disciplinary measures including suspension and termination.

The consultation step includes review of performance and behavior and collaborative development of an improvement plan to address mutually understood issues. The decision step is one where issues persist and an employee is given paid time off to decide whether he or she wishes to remain employed by the Company. A decision to stay is an expression of commitment to expectations established at the consultation step and expires after a maximum of one year. If the issues persist, the Company may terminate the employee. The Company may also place an employee in the decision step or terminate him on the first offense of significant infractions, eight examples of which are listed including "Disorderly or unsafe conduct involving behavior which threatens or inflicts bodily harm to another employee." The decision step, whether elected or imposed, is essentially a last chance agreement. Joint Exhibit 1, pages 22 and 23.

Article XVI encourages resolution of grievances short of arbitration and provides for binding arbitration as the final resolution where necessary. It limits an arbitrator's jurisdiction and permits her to determine an appropriate remedy.

The Company's alcohol and drug-free policy sets out circumstances when testing will be required including reasonable suspicion testing "(w)here there is reasonable suspicion that an employee is under the influence of a controlled substance or alcohol or there is a reasonable suspicion that an employee has violated the written rules in Section B of (the) Policy." The Section B regulations sanction unlawful use or being under the influence of controlled substances on Company premises, while performing Company work or driving Company vehicles. They, likewise, sanction consumption or being under the influence of alcohol. "Reasonable Suspicion" is defined as "(a) basis for forming a belief based on specific facts and rational inferences drawn from those facts." Joint Exhibit 1, pages 60 and 61.

Grievant's Discipline History

RJ, a 16 year veteran employee of the Company, had a good work performance and conduct record until 2007. Changes in RJ's work performance and reports of inappropriate behavior prompted an investigation conducted jointly by labor and management in mid-2007. The investigation resulted in a Formal Supervisory Referral to the EAP and an Agreement dated July 12, 2007, *in lieu* of other disciplinary measures to participate in evaluation. RJ signed the Agreement then rescinded it on the advice of an attorney. He had not made a timely appointment for EAP consulting. The Agreement had also been signed by NJ, Coating Supervisor, and BN, Union

President. The Referral to EAP identified attendance problems and unacceptable conduct as reasons for the referral. Job performance and on-the-job behavior issues included erratic work patterns and excessive errors, avoidance of supervisor and co-workers, unusual sensitivity to criticism, unusual criticism of others and failure to communicate. One work performance issue arose when a blade angle was improperly set resulting in weeping in the coating process and loss from production of nine double rolls of broke or more than 180 tons of paper. The error was dramatic, serious and unexpected from RJ who had a good work performance record.

Following RJ's rescission of the July 12, Agreement, a meeting was held among labor and management to determine next steps. The meeting was attended by Paper Production Manager KM, Supervisor NJ, Human Resources Manager CP, Union President BN and Union Vice President DL. BN wanted to impose the decision step and require drug and alcohol testing but the majority wanted to take the matter one step at a time. On August 13, 2007. RJ, DL, and Supervisors FD and NJ attended the meeting. They acknowledged their discussion by signing a Memo dated 8/13/07. The Memo reports the Company's decision to formally begin the disciplinary process at the consultation step, refers back to the July 12, Agreement and identifies "some areas of particular concern" including "(B's) personal behavior when interacting with other team members". It sets out expectations for RJ in addressing the issues including that he "must professionally communicate with team members" and "treat all team members with respect". Immediate discipline was set as the consequence for failing to handle issues in a professional and respectful manner. After setting a review date at the end of February, 2008, the Memo reiterates consequences in the event further issues arise:

Any further issues will result in further disciplinary action. Further disciplinary action will include mandatory referral to a company chosen counseling program (e.g., Lifeworks or similar), and also being placed into the decision step. If it is necessary to place Bob in the decision step, but Bob refuses the company chosen counseling program, it will lead to Bob's termination.

Company Exhibit 3

Incidents: SRM and RJ

SRM was hired by the Company in 2005, and was trained by RJ in the Coater area of the plant in May of 2006. He testified that RJ was a "pretty good guy to work with" until later in 2006, when their relationship deteriorated and he started to become hostile, calling him a "little bitch" and threatening to "drag (him) out of the building and beat the shit out of (him)". The team of workers witnessed the incident which SRM reported to his supervisor, FD. He declined offers from FD and BN to go to the Human Resources Department because "(he) did not want to blow the threats out of proportion." Following his report, his supervisor held a team meeting and directly cautioned RJ to "stay away" and "respect" SRM. He told RJ that the threats were not appropriate. See, SRM testimony

RJ continued to name call SRM, following him around the plant and cursing him. "Little bitch was his favorite name for (him)." In July, 2007, RJ worked as first assistant with SRM, in place of PJ who was on vacation and normally worked with SRM. On the first turnover one night, a drum fell behind the coater. RJ was "pissed off" and started cursing SRM. On each turnover through that night, he yelled at him, saying "(he) couldn't get any work out of him". He called him a "little bitch, queer and cocksucker" and he spit on him. At one point, he said to SRM, "if (you) like sucking cocks so much, (you) could suck (mine)." There were no witnesses to the events of that night. Supervisor FD was on vacation at the time and when he returned later in the month, SRM reported what had happened. FD met with RJ and SRM. SRM became aware that RJ had been placed in the consultation step, detailed above, following the incident.

At this hearing, SRM reported that RJ's behavior improved for a time after he was put in the consultation step. However, he began again to turn around as he left the plant and call out to SRM, cursing and calling him "little bitch." On October 31, 2007, they worked together on a shift that began at 5:30 a.m. and ended at 6:00 p.m. At about 4:30 p.m. after a turnover, SRM sat down on a chair waiting for the monorail. The chair had coffee on it and his pants were soaked. He was certain that RJ had poured coffee on his chair because he had seen him drinking coffee. He was tired of RJ's harassment; after reporting his problems with him to management, he did not feel there was any improvement. So, he decided to retaliate to make a statement that he did not intend to take his behavior any longer, and he put a small amount of water on the chair where RJ sat between work tasks.

At about 5:00 p.m., SRM was up on the catwalk over the pulper when RJ sat down on his chair and got his pants wet. RJ came up the steps opposite from the end of the catwalk where SRM was standing in one corner. RJ moved quickly toward him, swearing and asking him "why the fuck" he had put water on his chair. Close to the railing, he grabbed SRM by the neck and shoulder, cursing and threatening to bounce his head off the rail and to throw him into the pulper.¹ SRM got out of RJ's hold and went to the opposite end of the catwalk. RJ walked down the stairs and was standing at the bottom when SRM came down after finishing his work. RJ chest bumped him, calling him a little bitch and told him he would see him in the parking lot, that he would roll him if he ever saw him outside.

SRM was scared and went to Supervisor JD's office and asked what to do. SRM's Supervisor, FD came into JD's office and said he would take care of it. FD called Supervisor NJ and Union President BN and they met with SRM a short time later. SRM told them what had happened including his putting water on RJ's chair. He was told to call when he got home and to report if RJ contacted him. SRM was put in the consultation step for putting water on RJ's chair. He was told that neither pranks nor retaliation of any kind would be tolerated. Details of the investigation leading to termination of RJ are provided below.

¹ The pulper is a twenty foot drop below the catwalk on which SRM was working slabbing expired reels to the pulper for recycling of the waste paper. The work is a one-person task performed by the reserve position on the shift.

Co-workers were aware of the tension between RJ and SRM. They heard RJ name call and harass SRM and knew that RJ did not like him. They had witnessed the 2006, incident and attended the meeting called by FD to address it. Team Leader DL had seen RJ intimidate SRM. He had also been subject to harassing behavior by RJ who had left derogatory messages for him on his pager. The events involving Team Leader DL had been revealed in the investigation in July, 2007. RJ did not attend team meetings to avoid contact with both men.

Investigation of October 31, 2007, Incident; Termination

FD contacted NJ at about 5:30 p.m. on October 31, to advise that someone had been threatened and assaulted. NJ asked that BN come with him to meet with FD and SRM, which they did minutes later. NJ testified that SRM appeared shaken and scared and that he reported the incident as detailed just above in the preceding section.

After meeting with SRM, NJ, BN and FD met with RJ. RJ denied that there had been a confrontation with SRM. At first he said that there had been water on his chair and that he had politely asked SRM not to put water on his chair. A bit later, he said that he had accidentally spilled coffee on SRM's chair and he suspected that SRM had put water on his. He said that he avoids SRM and only talks with him about safety issues. He told them if anyone said he was up on the catwalk, they would be mistaken.

SRM was directed to go home and report that he was there safely. He was told not to speak with RJ. At BN's suggestion, BN and NJ stayed with RJ until they heard from SRM. RJ was advised that the matter was serious and he was placed on administrative leave.

The investigation continued on November 1, when NJ and Union Vice President DL interviewed SRM for a second time. They also interviewed four co-workers who had worked the shift with SRM and RJ the day before. SRM repeated exactly what he had said the day before concerning the assault and threat. None of his co-workers had witnessed the incident. NJ testified that Team Leader DL reported witnessing intimidating behavior toward SRM around Labor Day. He said DL had told them that he had seen RJ spit on SRM. DS testified at hearing that SRM had told him about RJ's threats and that he wanted RJ to be fired to end the harassment. He said SRM told him he wished that RJ would do something stupid so that he would be fired. He also testified that SRM knew about the blade angle error in July or August, 2007, and was surprised that SRM did not report it since everyone is responsible for quality work. Union VP DL interviewed several workers, on succeeding days, who had been assigned to the printer on the date of the incident.² None of them had witnessed the incident.

² The printer is a distance from the catwalk and pulper. There were 25-30 employees working maintenance on the printer that day. The coater, where RJ was assigned, is between the printer and the pulper. Photos of the catwalk and pulper are included in the hearing record. A whiteboard sketch was drawn at the hearing to depict the relationship of the catwalk and pulper to the coating machine and the coating machine to the paper machine.

On November 7, representatives of labor and management met to discuss the incident. The meeting was attended by Mill Director TC, Paper Production Manager KM, HR Manager CP, Supervisor NJ, and Union President BN and Vice President DL. Top management was brought up to speed on the details of the incident and investigation. There was discussion about earlier incidents and discipline, the relationship between RJ and SRM, reports of other hostile behavior demonstrated by RJ, the detail of the incident as reported by SRM and RJ's denial that an incident had occurred. The focus of the meeting was a conclusion that the investigation had clearly showed that hostile behavior had occurred and led to a belief that the incident had happened as reported by SRM. When asked whether he felt the incident happened, Union Vice President DL responded, "Yes, something happened." See, KM and DL testimony.

A meeting with RJ was scheduled for November 12. KM had not been able to reach him to meet on November 9. He finally left a voicemail setting the date, and he sent a confirming email to those in attendance at the November 7, meeting. He personally asked BN to be certain that RJ attended the meeting.

With input from the others, KM prepared a Memo to RJ dated November 9, 2007, reporting completion of the investigation and advising him that he was being placed in the Decision Step. A Formal Supervisory Referral to EAP was attached to the Memo. He addressed the results of the investigation; his placement in the Consultation Step on August 13, 2007; the provisions of Article XVII which support the action; the conditions of his placement in the Decision Step including immediate drug and alcohol testing, evaluation by Lifeworks for potential counseling, treatments and aftercare; attendance at all recommended treatment and aftercare; provision of a release of information form to the Company to discuss all matters with the EAP Coordinator and care providers; direction not to participate in any retaliatory behavior; consequences for failure to improve his behavior; and conditions for return from administrative leave including confirmation of negative drug and alcohol test and report of a meeting with Lifeworks with indication from a counselor that he could safely be returned to work. KM wrote as follows:

Although you denied this altercation took place, the investigation substantiated similar hostile , bullying, and intimidating behaviors by you toward this individual has taken place. The investigation team concluded that your recent behavior has changed significantly and you have created, and continue to escalate, a hostile work environment on your team.

* * *

The change in your behavior has led the Company to believe there is reasonable suspicion that something has changed to influence your behaviors at work. The company is concerned for your health and welfare as well as other employees.

* * *

- 1) You will undergo an immediate drug and alcohol screen, under the current drug policy guidelines for 'reasonable suspicion,' with consequences of positive results per the policy. Per the policy, refusal to undergo testing will be cause for immediate dismissal.

* * *

Improved behavior is imperative. Failure to resolve this problem could lead to further disciplinary action, including termination.

Company Exhibit 4

Unacceptable Conduct was the reason given for the EAP Referral. Job performance issues identified were low quality of work, erratic work patterns and poor judgment. Behavior on the job issues noted were avoids supervisor/co-workers, unusually sensitive to criticism, unusually critical of others, does not communicate and aggressive behavior to other employees. Reference was made to the Memo dated November 9, 2007, and there were affirmative responses to the questions whether disciplinary action was likely and whether the safety of RJ or other employees was a concern, describing the concern to be "aggressive behavior toward other employees".
Company Exhibit 4

The November 12, meeting was held in the Company Library. KM, CP, and NJ attended for the Company. RJ was represented by DL, and BN attended for the Union. After KM read the November 9, 2007, Memo line by line, the Union requested a caucus. BN asked clarifying questions including why drug testing was being required, what type of counseling was required and how RJ would be paid. The responses were that there was cause to believe there was a cause for the change in RJ's behavior and personality; that counseling would include a proper plan developed following the screening and Life Works or EAP evaluations; and that if RJ was in out-patient treatment, he would be working under the decision step, and if he was not working and was in treatment, accident and sickness coverage would apply. There was cross-reference to the August 13 and November 9, disciplinary Memos. After a lengthy caucus, BN advised the Company personnel that they should be ready for the biggest surprise of their life. When the Union returned, RJ took the floor and advised that he disagreed with everything in the November 9, Memo and EAP Referral, and that he felt the punishment was too harsh "after one small altercation with SRM". See, RJ testimony. KM testified that BN asked RJ if he was refusing to do the steps in the Decision Step to which RJ replied, "Yes." After being advised that termination was the alternative, he replied, "That is what it will have to be." and said he was acting against union advice. KM then told him he was terminated based upon totally unacceptable behavior on October 31, 2007, citing CBA Article XVII, number 5.

Following the meeting, CP confirmed the termination in a one page letter. He referred to RJ's refusal of the Decision Step conditions and quoted the CBA Alcohol and

Drug Free Policy at number 4 which calls for “immediate discipline, up to and including discharge” for refusing to undergo testing. He advised RJ that the Company was left without a choice given the clear expectations which had been set out in the August 13, 2007, Consultation Step meeting. Joint Exhibit 2

A Grievance was filed on behalf of RJ at Step 3 on November 14, 2007. It was denied by Memo dated December 4, 2007, written by TC, directed to BN, and copied to Union Representative Jerry Parzino, CP and KM. TC wrote that the basis for the Grievance were the facts that the incident was unproven and that evidence was insufficient to support a reasonable suspicion for drug and alcohol testing. TC referred to recent earlier discipline for several incidents, RJ’s refusal to accept counseling at that time, and the consultation document which was not grieved and which called for termination in the event of future discipline and refusal to counsel. TC referred to the conclusions of the recent investigation, the appropriateness of moving to the next level of discipline and RJ’s refusal once again to agree to conditions set out in the Decision Step. He concluded that RJ has been terminated for failure to submit to drug and alcohol testing and refusal at the Consultation Step to cooperate with counseling. With regard to reasonable suspicion for testing, TC “concluded that the Company had considerable evidence that (RJ) may be suffering from some sort of chemical addiction and influence, as marked by his substantial change in behavior, and that nearly everyone who was interviewed suspected something of this sort.” Joint Exhibit 3.

POSITION OF COMPANY

The Company argues that it had just cause to terminate RJ based upon his assault of another employee, and refusal to submit to drug and alcohol testing and counseling following investigation of the incident of October 31, 2007, *in lieu of* termination. It points to the earlier consultation agreement effective on August 13, 2007, due to expire in February, 2008, which imposed counseling requirements in the event further issues arose and which was offered in consideration of RJ’s long-term employment. It discusses a non-traditional CBA which calls for self-responsibility for performance and behavior and joint problem-solving when issues of performance or conduct arise. It argues that the Union mistakenly refers to the August 13, agreement as earlier discipline and describes it as a “continuing probationary process” which was in effect at the time of the incident. It characterizes its Decision Step provisions as tantamount to a traditional Last Chance Agreement and asserts that RJ elected his remedy when he refused the LCA. Here, it argues, it is more significant to recognize that the CBA supports termination for certain first offenses, specifically, “disorderly or unsafe conduct which threatens or inflicts bodily harm to another employee”.

The Company argues that RJ refused to follow Union advice on two occasions and points to unrefuted testimony that Union President BN supported drug and alcohol testing after the incident in question. It observes that RJ placed the Union in a difficult situation defending him against the Union’s advice. The Company addresses the specific terms of the August 13 agreement, which were drafted to deny RJ “the luxury of

declining an EAP evaluation a second time and continue his employment.” Company Post-hearing Brief at page 4. It emphasizes that RJ signed on to the August agreement after refusing testing and counseling which were requirements in the earlier agreement which he rescinded. It highlights the fact that a majority of Company and Union representatives took RJ’s tenure into account at that time as well.

The Company asserts that RJ’s refusal on two occasions resulted in reduction of the issue in this case to whether there was just cause for his termination based upon his misconduct on October 31, 2007. It argues the Union’s focus on a failure to support drug and alcohol testing on the date of the incident is misguided. Once again it emphasizes the issue is whether the incident occurred. It argues the evidence supports the Company’s conclusion that it did happen, providing express just cause for the termination. Referring to the Union’s objection to testimony concerning earlier incidents, the Company argues that SRM’s testimony concerning earlier bullying by RJ was particularly important, with no witnesses to the incident, lending credibility to his report of the events of October 31. By contrast, it argues, RJ’s testimony that there had been no confrontation or altercation or even words was not credible.

The Company points to additional testimony that supports its case including that of DL who reported to the Union/Management group that met on November 7, that RJ’s conduct was worse than had been realized in July and August and when his opinion was sought by them, that “something happened”. SRM’s reporting of continual taunting and name-calling, whenever he was within hearing, was also significant. The Company suggested that RJ chose moments when he would not be observed or heard by others, nonetheless, continuing earlier behavior after August 13. It pointed to the fact that RJ did not deny at hearing anything other than the incident itself.

It argues, any suggestion that SRM’s pouring of a small amount of water on the chair RJ would likely sit on, was sufficient provocation for RJ’s “vicious assault” on SRM, must be discounted. It suggests that RJ regarded SRM as submissive and was enraged when he retaliated against RJ’s suspected intentional act. It emphasizes the detail of RJ’s behavior in response which it argues constitutes assault and battery.

It attributes BN’s testimony at hearing that he saw no evidence of assault, that SRM did not appear to be someone who had been assaulted, to his conflicted role of investigator and potential advocate. It points to his notes made at the time he and NJ interviewed SRM and RJ and argues that they, by their nature and content, refute his testimony at hearing. It further argues, BN’s plan on the date of the incident to keep RJ at the Plant, until SRM reported that he was home safely, further refutes his live testimony. In sum, it argues that SRM’s demeanor as reported by others to be nervous, afraid and shaken by the incident, is supported by the record, and it suggests the fact of his reporting of the incident is meaningful since he testified that he had decided to finally retaliate against RJ. Had there been no response from RJ, the Company suggests SRM may have had cause for celebration.

It argues there is no evidence that SRM fabricated the incident, acknowledging that he had told one co-worker about an earlier incident with RJ saying that he wished RJ would do something stupid, like hit him, so that his behavior would finally be addressed.

The Company emphasizes that the decisions in this case were made jointly by Union and Management. It points to Company Exhibit 4, the decision step proposal, prepared jointly and written by KM, which sets out justification for termination and otherwise focuses on rehabilitation and continued employment, which RJ refused after caucusing and getting answers to his questions concerning the conditions including testing and counseling. It asserts the Grievant chose termination over the Decision Step and that the evidence supports a conclusion that he threatened and assaulted a co-worker. It seeks an Award which denies this Grievance.

POSITION OF THE UNION

The Union argues that Management has violated the parties Agreement by terminating an employee based upon unproven misconduct and lack of a reasonable suspicion to require drug and alcohol testing. It argues that RJ had complied with the requirements of the August 13, consultation document and that there was no evidence to support further discipline. It invokes the Seven Tests for Just Cause and argues three of the seven tests have not been demonstrated; first, the supervisor did not make certain that the Grievant violated the Company's rule or order before administering discipline; second, the investigation did not produce substantial evidence that he was guilty as charged; and, third, the degree of discipline was not related to the seriousness of the proven offense and the Grievant's record of service with the Company. The Union agrees the ultimate issue in the case is whether there was just cause for RJ's termination.

The Union lists thirteen points in support of its case based upon the evidence and testimony at hearing several of which overlap. It asserts that there was no proof of any violation of the August 13, 2007, consultation step discipline; that there was no proof of any change in RJ's behavior except a positive change as reported by management and co-workers who testified that they had had no issues with RJ ; that the only contact he had with SRM was to ask him in a respectful manner not to put water on his chair; that SRM has a poor work ethic and has had issues with his co-workers as a result; that SRM wanted to see RJ fired and would go so far as to provoke him; that SRM put water on RJ's chair; that there was no evidence of physical or verbal assault; that RJ never refused counseling or told two stories as stated in the Mill Manager's denial of the Grievance; that there was only one interview of RJ concerning the incident; that the August 13, consultation step did not require drug and alcohol testing for failure to comply with its terms; and, that the Company did not have a reasonable suspicion to request the testing. In sum, it argues that the investigation proved that RJ should not have been requested to be placed in the Decision Step or required to be evaluated or tested.

The Union addresses the testimony of each of the witnesses, highlighting points in support of its case and challenging the Company's case. It questions why NJ testified for two other witnesses, Supervisor FD and Crew Supervisor DL, pointing out that the investigation indicated that FD reported no issues with RJ following the August 13, consultation, and that DL had inaccurately reported that RJ had threatened and spit on SRM around Labor Day.

It pointed to SRM's testimony that RJ had not threatened or spit on him around Labor Day, and it highlighted his admissions that he put water on RJ's chair and was disciplined for it. It referred to the testimony of co-worker DS who said that SRM was upset that his work performance had been discussed with him by their Supervisor.

The Union notes that KM had not been involved in the investigations leading to the August 13, discipline or the incident involved in this case, and it challenges statements made in his November 9, 2007, Memo concerning changes in RJ's behavior. It argues the statement is inaccurate that his behavior had changed significantly and that he continued to escalate a hostile work environment on his work team. It reiterates that no complaints from other co-workers had been received and observes that RJ avoided personal contact with SRM and made work related contact only. Pointing to the other areas of concern for which he was cited in August, it observes he has not been cited for further issues with regard to attendance, misrepresentation in completing timesheets, misuse of the mill paging system or work performance in operating equipment. The Union asserts that there had only been one work performance issue in July, and he was the only one on the team disciplined although the entire team was responsible for quality.

Summarizing the testimony of co-workers MH and DS, it argues MH's testimony verified RJ was in complete compliance with the August 13, consultation discipline. It also observes that MH had not witnessed the incident, that he has never had an issue working with RJ and he knew that RJ and SRM did not get along. The Union reported that DS testified he complained regularly about SRM's work performance and that SRM complained to him when their supervisor discussed work performance with him. It also reported that DS testified about the work performance issue which prompted the July and August investigation and that SRM knew a blade angle was set improperly but "said nothing hoping Bob would get the blame." It also reported, "(SRM) told DS, he wanted to see Bob get fired and would go as far as to provoke Bob into assaulting him at work if need be."

The Union asserted that BN's testimony supported its case by refuting the conclusions of the investigation, reached and reported with regard to violation of the August 13, conditions or support for the request for alcohol and drug testing. It repeated that BN reported no signs of physical or verbal abuse when he interviewed SRM with NJ and reported his observation that there were no witnesses even though there were many employees working on the #12 paper machine in the area. It referred to his drawing on a white board at the hearing to show the relationship of the paper machine to the coater and the catwalk where the alleged incident had occurred,

challenging the close-up photos received into evidence with the Company's case which do not accurately reflect the work area in which the incident occurred. The Union argues that BN's testimony shed further doubt on TC's statements that RJ had told two stories since TC was not involved in the investigation and RJ was interviewed only one time.

The Union observes that DL was involved in all investigations leading to earlier and this discipline of RJ and argues that he testified that there was no evidence of violation of the August 13, consultation conditions referring to his conversations with FD and employees working on the paper machine at the time of the alleged incident. It reported his testimony that he could not support statements in the November 9, Decision Step Memo with regard to changed behavior and continued escalation of a hostile work environment.

Finally, the Union argues that RJ clearly and honestly denied verbally or physically assaulting SRM on October 31; that he admitted to asking him to not put water on his chair; and that he has had one consistent story throughout this matter. It argues that RJ chose termination on principle rather than saving his job by signing the Decision Step discipline. It asserts his testimony supports the others that he has been in full compliance with the August 13, consultation step. In sum, the Union argues there is not one fact, witness or bit of evidence that supports SRM's story and the discipline that followed.

The Union urges the Arbitrator to distinguish this case from the case before Arbitrator Wallin which was the subject of the Award presented with the Company's opening statement and received as Company Exhibit 1. It asserts the question in this case is different from that before Arbitrator Wallin in that he was deciding whether there had been a Decision Step violation when he concluded that his analysis was the same as that called for where there is a last chance agreement. It expresses its high regard for the Agreement provisions which address health and safety and a harassment and drug and alcohol free work environment, and argues that RJ has fulfilled his obligations under the consultation discipline. It argues that the Company testimony was vague and proven inaccurate by both Union and Company witnesses. It argues that SRM's testimony stands alone, against all other evidence and testimony, and does not support the Company's termination of RJ, a 16 year employee with an unblemished record until August, 2007. It asserts that RJ "got caught up in a personal issue with (SRM) do (sic) to (SRM's) work ethic. That was wrong, but when he was disciplined for it, he corrected his behavior. Although (B) was avoiding (SRM) as much as he possibly could, (SRM) still wanted to see him fired and found a way to achieve it." Union Post-hearing Brief, page 24.

OPINION AND FINDINGS

The record made in this case supports the conclusion that the Company had just cause to terminate RJ. The case poses several unique challenges and required very careful reading and re-reading of the record including 41 pages of post-hearing briefing,

copious notes taken by the Arbitrator of testimony of eight witnesses and review of fourteen exhibits, including several very dense Memos detailing decision-making and imposition of discipline two times, only months apart, in 2007. Although the parties agreed that the ultimate issue was whether the October 31, 2007, incident occurred as reported by RJ's co-worker, the record includes extensive detail surrounding the disciplinary process set out in the parties' Agreement, the disciplinary history in this case and the facts of the incident. This decision rests principally upon the credibility of witnesses; circumstantial evidence, supported by the Grievant's recent employment history, including a progression of discipline beginning with a verbal warning in 2006; and express Contract language.

The task here was not straight forward or easy. It was complicated by apparent lack of clarity with regard to a relatively new disciplinary procedure as evidenced in documentation and objections made at hearing. The parties' Agreement provides an employee focused collaborative scheme for addressing work performance and conduct issues. It also embraces traditional principles of progressive discipline and just cause. While the Grievant may have chosen termination over accepting the Company's offer of conditions set out in the decision step, there has been no question that he had a Contract-given right to this hearing and to a determination that there was just cause for the termination. The Company was inaccurate in arguing that this Arbitrator's analysis was tantamount to deciding a case where a last chance agreement was in effect. RJ rejected a last chance agreement, in effect demanding that the Company support his termination, which he argued was unfounded because the alleged incident involving SRM on October 31, 2007, never occurred. The Union disputed that there was reasonable suspicion to support a request for drug and alcohol testing, a reason given for his termination in CP's notice to him on November 14, 2007. By rejecting the proposed decision step, RJ refused to participate in required consultation and testing. While he could have submitted to testing and refused the decision step offer, the record is clear that he unequivocally chose termination.

Perhaps most noteworthy in reviewing this record is the backdrop of collaboration between labor and management in dealing with incidents as they arose and the thorough investigation which the record depicts. While the Union argued that RJ was only interviewed one time following the October 31, incident, there was no evidence of any objection to the investigative process at any stage of this matter before hearing. In fact, there is evidence that the Union supported more stringent discipline earlier, and that RJ acted against its advice in the summer of 2007, and in choosing termination leading to this case. In their testimony, Union leadership acknowledged the challenge it faces representing all members of the Union. The detail of the investigations in the summer and fall, including meetings and exchanges among labor and management representatives provide critical unrefuted participation by the Union in the decisions which were made with regard to RJ. There is clear evidence of shared concern and agreement that swift strong action was required to address escalating behaviors.

While the Company's case included some factual errors, it was credible in supporting the action it took relative to RJ. With few exceptions, the facts were

consistently reported and were corroborated. Its evidence and testimony firmly reflects unwavering commitment to the philosophy and execution of the disciplinary policy set out in its Agreement with the Union. Its decision, questioned by the Union, to call top management to testify on behalf of several staff and employees, who were involved and closer to the incidents which gave rise to the discipline, did not damage its case. Where errors were made, such as the testimony of NJ that Team Leader DL had reported an incident involving RJ and SRM around Labor Day, they were essentially acknowledged. SRM's credible testimony included his unequivocal refutation of NJ's testimony in that regard. There was no hint elsewhere in the record that the Company relied on DL's purported report. In fact, it seemed clear from the entire record, that NJ had testified to facts learned before the August, 2007, discipline.

Although not raised by the Union, the formal Notice of Termination was troubling in that its reference to the October 31, incident was oblique at best and gave rise, in the Arbitrator's view, to the Union's multiple theories of the case resulting in a somewhat murky and confusing presentation. For example, it objected to the Company's questions concerning the August discipline yet argued vigorously that RJ had paid the price for what should have been regarded as team error. As observed above, the Union was entirely proper in arguing that this case did not call for a determination based upon violation of a last chance agreement.

SRM's testimony was entirely credible. His consistency in reporting incidents involving RJ, beginning in 2006, was observed through evidence and testimony from both Company and Union witnesses. He reported the October 31, incident immediately and repeated the same facts the next day. He was not discredited in any manner on cross examination. Although objections to Union questions and testimony concerning his work performance were sustained as irrelevant, the Union inappropriately attempted to support its case by reference to work performance issues which RJ and others had with SRM. The record is replete with support for the conclusion that RJ held SRM in contempt for a long period of time, an attitude which was manifested in many ways. The Company is correct in observing that RJ did not deny any of the behavior described by SRM or others, except the detail of the incident on October 31.

The testimony of RJ was the weakest link in the Union's case. He had discredited himself at the time of the investigation of the incident and continued through his testimony on cross examination at hearing. He first told the Company and Union representatives that he had no verbal or physical contact with SRM, and if anyone said that he had been up on the catwalk, they would be mistaken. He then told them that he had politely asked SRM to not put water on his chair. He followed that statement with reference to his spilling of coffee and speculating that SRM had been provoked to put water on his chair.

RJ was nearly expressionless as he testified and reported an implausible story, incredible against the backdrop of his own reported disdain for SRM and earlier behavior. As important, are the facts that his Union representative suggested providing SRM with protection that day and agreed to placement of RJ on administrative leave;

that he reported to the labor management group, meeting to consider the results of the investigation, that RJ's conduct was much worse than they had thought in July, and agreed, "Something happened"; that the Union participated in crafting conditions of the decision step discipline; and announced after caucusing with RJ, that the assembled group was in for the surprise of their lives. Union witnesses and RJ confirmed that RJ's decision to refuse the decision step was made against Union advice. Most significant, was unrefuted testimony that when RJ announced his decision to the group, he told them he did not believe "such a slight altercation with SRM" called for the proposed discipline, an unwitting admission of guilt.

Although not the focus of this case, it is appropriate to briefly discuss the Alcohol and Drug Testing Policy and consequences for refusing to submit to testing. Notwithstanding credible testimony, from both Company and Union witnesses, relative to a suspicion that alcohol or drug use was the cause for significant changes in RJ's work performance and conduct, there was no expert or specifically informed evidence or testimony to provide support for the request for testing set out in the decision step plan which RJ rejected. He expressly stated in response to Union inquiry that he was rejecting the direction to counseling and drug testing. There is no doubt that the investigative team was operating in RJ's best interests and genuinely believed that such testing would assist in addressing the issues. Nonetheless, if his refusal to test were the only basis for his termination, this record is too shallow to support the action. In all other respects, the Company has sustained its burden in support of its action.

AWARD

The Grievance is denied. The Grievant was terminated for just cause.

Dated: July 25, 2008

Janice K. Frankman, Attorney at Law
Arbitrator